REMARKS

Favorable reconsideration and allowance of this application are requested.

I. Response to 35 USC §§101 and 112 Issues

By way of the amendment instructions above, claims 6 and 7 have been revised so as to recast the same as method claims requiring positive steps. As such, the Examiner's rejections advanced under 35 USC §§ 101 and 112 have been mooted.

II. Response to "Double Patenting" Issues

The Examiner has raised an "obviousness-type" double patenting rejection based on copending U.S. Serial Nos. 10/477,463, 11/253,754 and 11/448,737 (hereinafter "the copending applications"). In response, applicant is enclosing herewith a Terminal Disclaimer which disclaims that portion of any patent issuing hereon which may extend beyond the expiration date of any patent issuing on the copending applications. Additionally, the Terminal Disclaimer filed herewith also includes a provision that the patent issued hereon shall be enforceable only for and during such period that legal title thereto is the same as the legal title the copending applications.

While applicant does not concur with the Examiner's position that the improvement sought to be patented herein is merely a matter of obvious choice or design as compared to the inventions claimed in the copending applications, applicant wishes to point out that, in situations such as this, the issue is not one of "obviousness", but rather one of "identity of invention." *In re Vogel*, 164 USPQ 619 (CCPA 1970), *In re Kaplan*, 229 USPQ 678 (Fed. Cir. 1986). The Court in *Vogel* set forth the test for identity of invention as whether the claims of one case could be literally infringed without literally infringing the claims of the other. It is quite apparent that individual claims of the copending applications and a claim of the present application could be infringed literally without infringing literally the claims of the other. Hence, there is no "identity of

invention" so that the Terminal disclaimer enclosed herewith should, in any event, resolve the asserted issue of "double patenting".

III. Response to 35 USC §103(a) Issue

The only other issue to be resolved is the Examiner's rejection of the pending claims 1-5 as allegedly obvious (35 USC §103(a)) from published Canadian application (CA 2449208) in view of Eaton et al (US Published Appln. 2003/0047708). It appears, however, that the published CA '208 application does *not* qualify as statutory "prior art" as it was published *after* the priority date to which the subject application is entitled.

Specifically, applicants note that the CA '208 publication was published on December 19, 2002 while the present invention is entitled to the priority filing date of December 12, 2002 accorded to the priority DE 10258385.4 application (hereinafter "DE '385 application") from which the subject U.S. application claims ultimate priority.

Therefore, applicants have attached hereto a certified English-language translation of the priority DE '385 application so as to remove the CA '208 publication as a reference. The rejection advanced under 35 USC §103(a) based on the combination of the CA '208 publication and Eaton et al should likewise be withdrawn.

IV. Conclusion

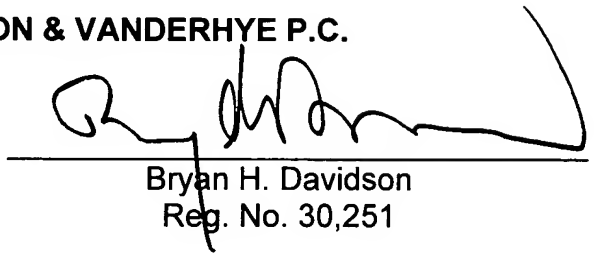
Every effort has been made to advance prosecution of this application to allowance. Therefore, in view of the amendments and remarks above, applicant suggests that all claims are in condition for allowance and Official Notice of the same is solicited.

Should any small matters remain outstanding, the Examiner is encouraged to telephone the Applicants' undersigned attorney so that the same may be resolved without the need for an additional written action and reply.

An early and favorable reply on the merits is awaited.

Respectfully submitted,

NIXON & VANDERHYE P.C.

By: 

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